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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

No. 745

C. L. HILLIARD,

Appellant,

vs.

CITY OF GAINESVILLE, FLORIDA,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

MOTION TO AFFIRM OR DISMISS

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Appellee, pursuant to Rule 16 of this Court, respectfully moves that the decision of the Supreme Court of Florida, *Hilliard v. City of Gainesville*, 213 So. 2d 689 (Fla. 1968), here appealed be affirmed on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument, or in the alternative to dismiss this appeal on the ground that it does not present a substantial federal question.

STATEMENT

The Appellant was convicted by the Municipal Judge for violation of a municipal ordinance proscribing the offense of driving a motor vehicle while under the influence of intoxicating beverages from which he took, as a matter of right, an appeal to the Circuit Court which reversed for failure to provide a jury trial. Certiorari sought by the City of Gainesville in the First District

Court of Appeals of Florida resulted in reinstatement of the Judgment of the Municipal Court, which was then also upheld on Certiorari by the Supreme Court of Florida. The Supreme Court of Florida noted *Duncan v. Louisiana*, 391 U.S. 145, 20 L.Ed. 2d 494, 88 S.Ct. 1444 (1968), and properly distinguished this case from the rule in *Duncan* since the offense is for a violation of a municipal ordinance and the maximum authorized penalty is sixty days imprisonment in the City Jail and a $500.00 fine, *Hilliard v. City of Gainesville*, 213 So. 2d 689 (Fla. 1968). The actual sentence in this case was thirty days imprisonment, fifteen of which were suspended, and a $250.00 fine.

Appellant contends that notwithstanding the maximum authorized sentence is only sixty days, the case sub judice is not within the limits and requirements imposed by *Duncan;* first, because of the intrinsic nature of the offense, and second, because of the additional penalty of loss of driver's license.

ARGUMENT

The decision of the Supreme Court of Florida is correct. The City of Gainesville derives its power from the Florida Legislature and under its Charter, Chapter 12760, Laws of Florida 1927, it has the power to try offenses only without a jury for violating municipal ordinances and the maximum sentence which may be imposed is sixty days imprisonment and $500.00 fine. Sec. 7(z), Ch. 12760, Laws of Florida (1927), (The Gainesville Charter) reads that the City of Gainesville shall have the power:

> "(z). To make and enforce all ordinances, rules and regulations necessary or expedient for the purpose of

> carrying into effect the powers conferred by this charter or by any general law, and to provide and impose suitable penalties for the violation of such ordinances, rules and regulations, or any of them, *by fine not exceeding five hundred dollars or imprisonment at hard labor on the streets or other works of the city, for a term not exceeding sixty days, or both.*" (Emphasis added).

These maximum penalties are consistent with the general laws of Florida relating to municipalities, Section 165.19, Florida Statutes (1967).

The Florida Constitution ratified in 1886 provides in Section 3 of the Declaration of Rights:

> "The right of trial by jury shall be secured to all, and remain inviolate forever."

and further in Section 11, Declaration of Rights:

> "In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury, * * * ".

The Supreme Court of Florida has on numerous occasions expressly construed these Constitutional requirements as not applying to violations of municipal ordinances. *Theisen v. McDavid*, 34 Fla. 440, 16 So. 321 (1894); *Hunt v. Jacksonville*, 34 Fla. 504, 16 So. 398 (Fla. 1894); *Orr v. Quigg*, 135 Fla. 653, 185 So. 726 (Fla. 1938); *Wright v. Worth*, 83 Fla. 204, 91 So. 87 (Fla. 1922); and *Gillooley v. Vaughn*, 92 Fla. 943, 110 So. 653 (Fla. 1926). The Supreme Court of Florida has also specifically held that these same Constitutional requirements

do not apply to trial in Municipal Court for the offense of operating a motor vehicle while under the influence of intoxicating beverages. *State v. Parker,* 87 Fla. 181, 100 So. 260 (Fla. 1924); *Boyd v. County of Dade,* 123 So. 2d 323 (Fla. 1960); and *Hilliard v. City of Gainesville,* 213 So. 2d 689 (Fla. 1968).

Although one may disagree, and Judges and Courts may disagree, as to whether a particular offense should be classified as "petty" or "serious", depending on one's attitude, it would seem of extreme importance to this Court that determinations by State Courts in classifying an offense as "petty" or "serious" should have great weight when applying subjective tests and especially where no clear standard for legal determination has been otherwise set; provided, of course, that such determination is not contrary to mechanical standards set such as length of maximum sentence.

The Florida Supreme Court has always recognized that "serious" offenses require jury trials while "petty" offenses do not and such characterizations have been made under Florida's Constitutional provisions not too dissimilar to those in our United States Constitution. Since essentially the same safeguards are sought to be preserved and for the same basic reasons, and since in such characterizations there results no violence to the mechanical test involved regarding maximum sentence, when a State Court has determined that the offense of violating a municipal ordinance denouncing driving a motor vehicle while under the influence of intoxicating beverages is a "petty" offense allowing a maximum sixty days imprisonment, such determination by a State Court should not be overturned. Disagreement with such a determination would arise only

because of the danger considered to the public generally by such offender, (a consideration which the State Court should be more properly and ably concerned with under our federal system) but it is the offender's rights which are constitutionally protected in guaranteeing a jury trial and not those of the public generally.

It is clear that the mechanical tests of maximum imprisonment allowed as suggested in *Duncan*, supra, and *Cheff v. Schnackenberg*, 384 U.S. 373, 16 L.Ed. 2d 629, 86 S.Ct. 1523 (1966), are not violated here since the maximum imprisonment that the City may impose is only sixty days. To declare that the intrinsic nature of this offense is "serious" and therefore should be so characterized legally is to suggest that the Supreme Court of Florida is in error in its subjective determination of matters which it is more directly responsible for, the public peace, welfare and safety of the people generally.

The distinction between "petty", or "serious" offenses is attempted by numerous authorities: Frankfurter & Corcoran, "Petty Federal Offenses And The Constitutional Guaranty Of Trial By Jury", 39 Har. L. Rev. 917 (1926); Kaye, "Petty Offenders Have No Peers!", 26 U. of Chi. L. Rev. 245 (1959), and cases decided by and familiar to this Court, but in considering the guarantees safeguarded in our Constitution, distinctions should be drawn not by considering whether the offense is "petty" or "serious" to the public generally, but whether such a charge and conviction of a defendant may result in serious consequences to the defendant. The constitutional protection of a jury trial is for the benefit of the person charged, and not for the government representing the people.

Nor do we believe that because defendant's driver's license is placed in jeopardy that therefore the constitutional requirements of a jury trial are invoked. Jury trial safeguards are for protection against imprisonment and certainly one may not assert that such safeguards are to be extended to protect against possible loss of a pure privilege. That a driver's license is a privilege and may be administratively taken away has been upheld by various State Courts: 71 ALR 616, 108 ALR 1162 and 125 ALR 1459. This Court refused to overturn the administrative revocation of a driver's license in *La Forest v. District of Columbia,* 67 App. D.C. 396, 92 F.2d 547 Cert. Den., 302 U.S. 760, 82 L.Ed. 588, 58 S.Ct. 367 (1937). The State of Florida is aligned with those jurisdictions which hold that a driver's license is a privilege and bestows no absolute property right on the licensee. Although such licenses may not be:

> "* * * revoked arbitrarily or capriciously, we have nonetheless consistently followed the rule, which appears to be unanimous throughout the country, to the effect that upon a proper showing in accord with the prevailing statutes a motor vehicle operator's license may be revoked." *Smith v. City of Gainesville,* 93 So. 2d 105, 106 (Fla. 1957).

It should be noted that the City of Gainesville has not and could not revoke the driver's license in this case. This authority is vested in the State Department of Public Safety, Ch. 322, Florida Statutes (1967), specifically Sec. 322.26. The Florida Supreme Court has declared that:

> "* * * revocation of a driver's license is not regarded as punishment of the offender. Under the applicable

statute it is an administrative remedy for the public protection that mandatorily follows conviction for certain offenses." *Smith v. City of Gainesville,* 93 So. 2d 105, 107, (Fla. 1957).

Since the Florida Supreme Court in construing Florida regulatory statutes governing the revocation of a state given privilege is not punishment to the offender, such construction should be persuasive here and further limit the thrust of Appellant's contention that his license revocation places him within the ambit of Sixth Amendment protections. It should be noted that Florida law permits one whose driver's license has been revoked to seek a hearing before the Department of Public Safety for reinstatement of such driver's license. Section 322.271, Florida Statutes (1967).

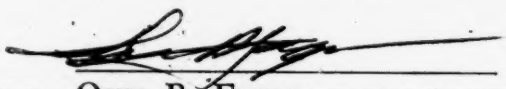
CONCLUSION

The underlying and fundamental purpose of all laws should be the protection of rights and in this instance the rights of the individual defendant—Appellant. Except for a trial by jury Appellant has been afforded every protection and all due process. The record here clearly demonstrates that Appellant was fairly tried before a qualified and impartial Judge; he was ably represented by competent counsel; he was afforded a public trial and faced and cross-examined witnesses against him; the evidence was abundant to support the judgment; and his case has been reviewed by three Appellant Courts including the Supreme Court of Florida which decision was rendered subsequent to and in recognition of the rule in *Duncan.* The maximum penalty which could have been imposed is below the limits set forth in *Duncan* and *Cheff* and as

defined by Congress in 18 U.S.C.1. The offense has been characterized by the Florida Supreme Court as "petty".

We, therefore, respectfully submit that the decision of the Supreme Court of Florida should be affirmed or this appeal dismissed.

Respectfully submitted,



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